U.S.
APR 22 2011
OFFICE OF THE CLERK

No. 10-1125

IN THE
Supreme Court of the United States

DANIEL GUGGENHEIM, SUSAN GUGGENHEIM, AND MAUREEN H. PIERCE,

Petitioners,

v.

CITY OF GOLETA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

REPLY BRIEF FOR PETITIONERS

ROBERT S. COLDREN
MARK D. ALPERT
HART, KING & COLDREN, PC
200 E. Sandpointe
4th Floor
Santa Ana, CA 92707
(714) 432-8700

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
JOHN F. BASH
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
TOlson@gibsondunn.com

Counsel for Petitioners

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

REPLY BRIEF FOR PETITIONERS 1

I. THE NINTH CIRCUIT HELD THAT PETITIONERS' POSTENACTMENT PURCHASE ALONE WAS "FATAL" TO THEIR CLAIM 2

II. THE CITY CONCEDES THAT FEDERAL AND STATE APPELLATE COURTS HAVE REJECTED THE PROPOSITION THAT A POSTENACTMENT PURCHASER MAY NOT BRING A REGULATORY TAKINGS CLAIM 6

III. THE FACTUAL DISPUTES THAT THE CITY RAISES UNDERSCORE THE NINTH CIRCUIT'S ERROR IN RESOLVING THIS CASE AT SUMMARY JUDGMENT 9

CONCLUSION 12

TABLE OF AUTHORITIES

Page(s)

Cases

Buhmann v. State,
201 P.3d 70 (Mont. 2008) 8

Lingle v. Chevron U.S.A. Inc.,
544 U.S. 528 (2005) 11

Lucas v. S.C. Coastal Council,
505 U.S. 1003 (1992) 6

Mehling v. Town of San Anselmo,
No. A1-2563, 2004 WL 1179428
(Cal. Ct. App. May 28, 2004) 6

Nollan v. Cal. Coastal Comm'n,
483 U.S. 825 (1987) 1

Palazzolo v. Rhode Island,
533 U.S. 606 (2001) 1, 4

Penn Cent. Transp. v. New York City,
438 U.S. 104 (1978) 4

Raceway Park, Inc. v. Ohio,
356 F.3d 677 (6th Cir. 2004) 7

Rural Water Co. v. Zoning Bd. of Appeals,
947 A.2d 944 (Conn. 2008) 8

Shaw v. Cnty. of Santa Cruz,
88 Cal. Rptr. 3d 186
(Cal. Ct. App. 2008) 9

Sinclair Broad. Group, Inc. v. FCC,
284 F.3d 148 (D.C. Cir. 2002) 7

Travis v. Cnty. of Santa Cruz,
94 P.3d 538 (Cal. 2004) 7

Rules

Cal. R. Ct. 8.1115 7

REPLY BRIEF FOR PETITIONERS

Respondent City of Goleta concedes that in *Palazzolo v. Rhode Island*, 533 U.S. 606 (2001), this Court rejected a "'blanket rule'" that "a property owner who acquired property with notice of the challenged regulation could never challenge that regulation as an uncompensated taking." Brief in Opp. 14 (citing and quoting *Palazzolo*, 533 U.S. at 616, 626). The City also appears to concede, contrary to the Ninth Circuit's holding below, that *Palazzolo* applies not only to those who acquire property "by operation of law, during the period when the owner was ripening the claim," Pet. App. 15a, but also to those who purchase property after a regulation is promulgated—a concession compelled by *Palazzolo*'s plain language. *See, e.g.*, *Palazzolo*, 533 U.S. at 628 (rejecting "blanket rule that *purchasers* with notice have no compensation right" (emphasis added)); *see also Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825, 834 n.2 (1987).

Instead of defending the Ninth Circuit's decision on its own terms, the City rewrites it. According to the City, the Ninth Circuit conducted a fact-intensive *Penn Central* analysis that did not turn solely on the fact that petitioners had purchased the mobile-home park after the rent-control regime had gone into effect. But the City's own analysis gives the game away: Echoing the Ninth Circuit, the City argues that each of the three *Penn Central* factors turns solely on the timing of petitioners' purchase. In the City's view, the challenged ordinance has no "economic impact" on petitioners because it "had applied to the property for the preceding two decades"; their investment-backed expectations were not upset because they purchased the property "ten years after

the County amended the challenged rent limits"; and the character of the government action was such that it "did not change the status quo." Brief in Opp. 1–2. Repackaging the forbidden "blanket rule" as a *Penn Central* analysis cannot reconcile the Ninth Circuit's holding with *Palazzolo*.

In reality, the Ninth Circuit squarely held that petitioners "could have no 'distinct investment-backed expectations'" that they could obtain rent in excess of what was permitted by the preexisting rent-control law, and that this sole fact was "fatal to [petitioners'] claim." Pet. App. 18a–19a. It distinguished *Palazzolo* on the ground that in that case the transfer of property had occurred by operation of law, while petitioners had purchased their mobile-home park, and so "the price they paid for the mobile home park doubtless reflected the burden of rent control they would have to suffer." *Id.* at 18a; *see also* at 36a (Bea, J., dissenting) ("[T]he majority points out the transfer in *Palazzolo* was by operation of law . . . whereas [petitioners] purchased the mobile home park on the open market. So?"). As the numerous *amici curiae* supporting this petition recognize, the Ninth Circuit's holding "directly contravenes Supreme Court precedent." *Id.* at 35a (Bea, J., dissenting). Accordingly, this Court should grant review.

I. THE NINTH CIRCUIT HELD THAT PETITIONERS' POSTENACTMENT PURCHASE ALONE WAS "FATAL" TO THEIR CLAIM.

In its brief in opposition, the City mischaracterizes the opinion below. Although the Ninth Circuit cited the *Penn Central* factors, the opinion concluded that the sole fact that defeated petitioners' claim was that petitioners had purchased the mobile-home park after the rent-control regime had first gone into ef-

fect. As the court stated, the challenged regulatory restriction was "promulgated long before [petitioners] bought their land, and the rent control regime . . . limited the value of the land when [petitioners] bought it." Pet. App. 14a. The court then treated the "economic impact" and "investment-backed expectations" factors as a single "'primary factor'" and held that this primary factor was "fatal to [petitioners'] claim" because "the price they paid for the mobile home park doubtless reflected the burden of rent control they would have to suffer." *Id.* at 18a. Petitioners, the court argued, "could have no 'distinct investment-backed expectations' that they would obtain illegal amounts of rent." *Id.* at 19a. If an unlawful taking occurred, the court reasoned, it "occurred in 1979 and 1987, from other landlords, and probably benefitting other tenants." *Id.* at 22a. There is no reasonable reading of this analysis other than that a postenactment purchaser may not challenge a law as a regulatory taking.

Even while purporting to recount the Ninth Circuit's fact-intensive *Penn Central* analysis, the City's brief in opposition makes clear that petitioners' takings claim was rejected (at summary judgment) solely because they purchased the property subject to the rent-control regime. The City argues, for example, that the ordinance does not have a severe economic impact on petitioners because it was only the initial enactment of the rent-control regime in 1979 and 1987 that depleted the land's value. Brief in Opp. 9. Similarly, the City maintains that the ordinance did not impact petitioners financially because they presumably "paid a lower price for their property as a result" of their notice of the preexisting law. *Id.* Indeed, the City's central defense of the rent-control regime is that it was not the 2002 city ordi-

nance that deprived the property of value, but rather the prior (identical) county regulations that were in effect when petitioners acquired the mobile-home park. *Id.* That is just another way of saying that the preexistence of a restriction defeats a regulatory takings claim.

In the same vein, the City argues that the "investment-backed expectations" and "character of the government action" factors do not support petitioners' claim solely because the regulatory restriction predated their purchase of the mobile-home park. *See* Brief in Opp. 11 ("In 1997, when Petitioners purchased the property, the program had been in effect for nearly 20 years."); *id.* at 2 ("The 2002 enactment . . . did not change the status quo at all [but rather] perpetuated a regulation that two decades before had 'adjusted the benefits and burdens' of the commercial relationship between mobile home park owners and tenants." (quoting *Penn Cent. Transp. v. New York City*, 438 U.S. 104, 124 (1978))). That analysis, in which each of the *Penn Central* factors turns exclusively on the timing of the purchase, does not reflect the "'ad hoc, factual inquir[y]'" that the City claims the Ninth Circuit conducted. *Palazzolo*, 533 U.S. at 633 (O'Connor, J., concurring) (quoting *Penn Cent.*, 438 U.S. at 124).

In addition, the City conspicuously fails to defend the Ninth Circuit's ground for distinguishing *Palazzolo*. According to the Ninth Circuit, petitioners "do not have the problem that *Palazzolo* solved," because *Palazzolo* was limited to avoiding the unfairness that would result from barring a takings claim when property is transferred to a new owner "by operation of law, during the period when the [previous] owner was ripening the claim by exhausting state remedies." Pet. App. 14a–15a. Unlike petitioners, the

Ninth Circuit stated, the property owner in *Palazzolo* did not purchase "the property for a low price reflecting the economic effect of the regulation." *Id.* at 15a. As the petition demonstrated, that reasoning flatly contradicts *Palazzolo*'s repeated statements that its rule encompassed postenactment purchasers, not only those who acquire property by operation of law. *See* Pet. 15.

The City seeks to salvage the Ninth Circuit's holding on the ground that "the court acknowledged that Petitioners could still bring an as-applied challenge," suggesting that petitioners will be able to obtain the relief sought in a subsequent case. Brief in Opp. 15. That suggestion is incorrect. The as-applied challenge that the Ninth Circuit envisioned would *not* be a challenge to the imposition of the regulatory scheme; the court ruled that such a claim is barred for postenactment purchasers. Rather, it would be a much narrower challenge to the ordinance's "limitation on the amount by which rents can increase and the provisions for arbitration of rent increases." Pet. App. 16a n.37. In other words, petitioners may be permitted to challenge a *future* regulatory action, such as a too-small increase in the rent ceiling. But with respect to any *past* regulatory actions—*i.e.*, the imposition of the rent-control regime itself, which diminished petitioners' property value by 80% through a one-time wealth transfer to owners of mobile homes—the Ninth Circuit held that petitioners' claim is barred.[1]

---

[1] In any event, as the dissent noted, the distinction between a facial and an as-applied challenge—that is, a challenge that the scheme constitutes a taking in every case versus a challenge that it constitutes a taking only in a specific case—has no basis in this Court's takings jurisprudence. "If the *expectations* are

II. The City Concedes That Federal And State Appellate Courts Have Rejected The Proposition That A Postenactment Purchaser May Not Bring A Regulatory Takings Claim.

The City concedes that the Federal Circuit and state appellate courts "recognize that a plaintiff's preacquisition notice of a regulation does not absolutely bar a takings claim," including where the plaintiff acquired the property through purchase. Brief in Opp. 17–18. For that reason, if this Court agrees with petitioners that the decision below bars such claims, the City would have to concede that there is a stark division of authority among lower courts that this Court should resolve.

The City separately argues that there is no division of authority between the Ninth Circuit and California state courts because in *Mehling v. Town of San Anselmo*, No. A1-2563, 2004 WL 1179428 (Cal. Ct. App. May 28, 2004), the court considered a "categorical" regulatory takings claim—that is, a claim that the "regulation denies all economically beneficial or productive use of land," *Lucas v. S.C. Coastal Council*, 505 U.S. 1003, 1015 (1992)—rather than a *Penn Central* claim. But the City leaves unexplained why there would be a distinction between the two types of regulatory takings claims with respect to whether a postenactment purchaser may obtain compensation. And in any event, the California

---

[Footnote continued from previous page]

valid and are expropriated, what does it matter as to their existence that they will be injured in all cases (facial challenge) or just in some (as-applied challenge)? Either they are valid expectations, or they aren't." Pet. App. 37a (Bea, J., dissenting).

court expressly held that *Palazzolo* "did not turn on th[e] fact" that "title was transferred by operation of law" and therefore that the "holding and rationale of *Palazzolo* apply regardless of whether title to the property is transferred by operation of law or purchased in an arm's length transaction." *Id.* at *6 n.6. That holding directly conflicts with the Ninth Circuit's understanding of "the problem that *Palazzolo* solved" and its holding that the *Palazzolo* rule does not apply to postenactment purchasers. *See also Travis v. Cnty. of Santa Cruz*, 94 P.3d 538, 545 (Cal. 2004) (explaining that *Palazzolo* discredited the "idea that a postenactment purchaser takes with notice of the legislation and therefore cannot claim it effects a taking").[2]

The City also cites other decisions from federal and state courts that it claims support the decision below. Brief in Opp. 19–20. None of those cases, however, held that *Palazzolo* does not apply to postenactment purchasers, as the Ninth Circuit did. For example, the Sixth and D.C. Circuit cases that the City cites—neither of which discussed *Palazzolo*—merely held, echoing Justice O'Connor's concurrence, that notice of the regulatory restriction is one factor to be considered in the *Penn Central* analysis. *See Raceway Park, Inc. v. Ohio*, 356 F.3d 677, 685 (6th Cir. 2004); *Sinclair Broad. Group, Inc.*

---

[2] The City, before trying to turn *Mehling* to its advantage, claims that petitioners "improperly rely on an unpublished decision of the California Court of Appeal," citing a California rule of procedure prohibiting "a court or a party" from citing unpublished decisions. Brief in Opp. 18 n.4 (citing Cal. R. Ct. 8.1115). But California procedural rules do not restrict parties' arguments in this Court, just as they do not govern this Court's opinions.

v. FCC, 284 F.3d 148, 167 (D.C. Cir. 2002). The City's state-court cases all held similarly.

Moreover, nearly all of the state cases arose in a materially different posture than this case: The trier of fact made detailed findings about the plaintiff's investment-backed expectations, and the appellate court reviewed those findings under a deferential standard of review. Here, by contrast, the Ninth Circuit affirmed the district court's grant of summary judgment to the City.

For example, in *Rural Water Co. v. Zoning Board of Appeals*, 947 A.2d 944 (Conn. 2008), the Supreme Court of Connecticut correctly held, citing *Palazzolo*, that "the plaintiff's takings claim [was] not barred merely because it acquired title to the property *after* the upzoning that ultimately defeated its later variance applications." *Id.* at 956 n.15. Applying the "clearly erroneous" standard to the factual findings of the trial court, the court denied the plaintiff relief because it had not presented sufficient evidence of its investment-backed expectations or a diminution in the value of its property. *Id.* at 955–57.

Likewise, in *Buhmann v. State*, 201 P.3d 70 (Mont. 2008), the Supreme Court of Montana reviewed under the "clearly erroneous" standard the district court's comprehensive factual findings, entered after a bench trial, about the reasonableness of the plaintiffs' expectations. *Id.* at 79, 93–94. The court then carefully weighed all three *Penn Central* factors, one of which it held to support a finding of a regulatory taking, and concluded that "the District Court did not err" in entering judgment in favor of the defendant. *Id.* at 94. In the decision below, by contrast, the Ninth Circuit did not permit the development of a factual record that would have facili-

tated such thorough review. *See also Shaw v. Cnty. of Santa Cruz*, 88 Cal. Rptr. 3d 186, 224 (Cal. Ct. App. 2008) (reviewing for substantial evidence district court's findings after bench trial and concluding that the "record thus supports that neither the County's action nor the subsequent passage of time directly affected any *distinct*, investment-backed expectations held by the Shaws that specifically related to their electrical-permit application").

In any event, to the extent there are other appellate cases adopting the Ninth Circuit's reasoning, that would only amplify the need for this Court to resolve the question presented.

III. The Factual Disputes That The City Raises Underscore The Ninth Circuit's Error In Resolving This Case At Summary Judgment.

Throughout its brief, the City argues the contested factual issues of this case, all of which were obviated by the legal rule applied by the Ninth Circuit to affirm the lower court's award of summary judgment to the City. Brief in Opp. 8–14. These factual issues thus are irrelevant to the question presented and have no bearing on whether that question warrants this Court's review.

In any event, because this case does arise from an award of summary judgment, at this stage genuinely disputed issues must be resolved in petitioners' favor—not the City's. And the summary-judgment record demonstrates that most, if not all, of those questions would ultimately be so resolved. For example, the City protests the dissent's statement that petitioners had "presented evidence that the Ordinance deprives them of approximately 80% of the market value of their mobile home park land," Pet. App. 30a

(Bea, J., dissenting), on the ground that "the evidence showed only that the mobilehome space *rents* controlled by the ordinance were below prevailing market *rents* for comparable spaces." Brief in Opp. 10. But because the land is used only to rent mobilehome spaces, the 80% reduction in rents equates to an 80% reduction in the value of the land. And a "finder of fact could easily determine that a loss of 80% of the market value of property is . . . a severe economic burden." Pet. App. 32a (Bea, J., dissenting).

The City similarly argues that the petition failed to discuss the evidence that the City's voluntary adoption of the preexisting rent-control regime in 2002 upset petitioners' investment-backed expectations. Brief in Opp. 11 n.3. Petitioners presented this evidence to the district court, but the Ninth Circuit ignored it in holding that the City was properly awarded summary judgment on the sole, "fatal" ground that petitioners had purchased the land after the rent-control regime was already in effect. *See* Pet. App. at 41a (Bea, J., dissenting) (discussing "evidence presented to the district court" of petitioners' investment-backed expectations). And even if petitioners had presented no evidence of investment-backed expectations, that is but one consideration in the *Penn Central* analysis and could not alone justify granting summary judgment to the City, particularly in light of the severe diminution in the value of petitioners' land as a result of the rent-control ordinance.[3]

---

[3] The City also argues that the investment-backed expectations of the mobile-home owners would be disrupted by repealing the ordinance. *See* Brief in Opp. 21–22. But this Court has never held that the expectations created by the challenged

Finally, the City contends that both the petition and the dissent presented arguments with regard to the "character of the government action" that conflict with *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), which held that a law may not be deemed a taking on the ground that it fails to advance a legitimate state interest. Brief in Opp. 13. But it is not the mere fact that the ordinance does not advance its purpose of reducing rents that renders it a taking. Rather, because it "does nothing to curb housing costs or provide a stable population once the original tenant has sold or leased the mobile home," Pet. App. 44a (Bea, J., dissenting)—that is, because it accomplished only a one-time wealth transfer—it is not a "public program adjusting the benefits and burdens of economic life to promote *the common good*," which is precisely the standard articulated in *Lingle*. 544 U.S. at 539 (internal quotation marks omitted; emphasis added); *see also id.* at 542 ("how [a] regulatory burden is *distributed* among property owners" is relevant to takings analysis).

[Footnote continued from previous page]

regulation itself are relevant to the *Penn Central* analysis. Such a rule would permit governments to transfer private property from one party to another with impunity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

ROBERT S. COLDREN
MARK D. ALPERT
HART, KING & COLDREN, PC
200 E. Sandpointe
4th Floor
Santa Ana, CA 92707
(714) 432-8700

THEODORE B. OLSON
Counsel of Record
MATTHEW D. MCGILL
JOHN F. BASH
GIBSON, DUNN & CRUTCHER LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
(202) 955-8500
TOlson@gibsondunn.com

Counsel for Petitioners

April 22, 2011